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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1043

JAMES H. O'HARA,

Petitioner,

versus

DISTRICT OF COLUMBIA

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA AND BRIEF IN SUP-
PORT THEREOF.**

WILLIAM J. O'MAHONY,
Counsel for Petitioner.

**T. EMMETT MCKENZIE, and
JAMES L. BUCKLEY,**
Of Counsel.

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DISTRICT OF COLUMBIA

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA**

MAY IT PLEASE THE COURT:

James H. O'Hara, petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above entitled cause on December 26, 1944, affirming a summary judgment of the District Court of the United States for the District of Columbia in favor of the District of Columbia, a municipal corporation.

Questions Presented

The questions presented for consideration are as follows:

I

Whether the District Court below, after entering an order denying the plaintiff's motion for judgment, has the power,

in the absence of the vacation of such judgment, to subsequently enter an order granting the plaintiff's similar motion for judgment in its favor, adjudging that the plaintiff have and recover possession of the certain real estate involved in the civil action?

II

Whether a defendant in a suit for ejectment, wherein he has demanded a trial of the issues by a jury, may be lawfully deprived of such trial by the Court, by means of its entry of an order granting a motion of the plaintiff for judgment in its favor, and without supporting evidence of any nature, and not filed pursuant to Rule 56 of the Federal Rules of Civil Procedure?

Summary Statement of the Matter Involved

This cause originated in the Municipal Court of the District of Columbia as an action in Forceible Entry and Detainer, brought by the District of Columbia, as a municipal corporation, against the petitioner, James H. O'Hara, on February 8, 1943. The basis of the action was that the District of Columbia had previously acquired the fee simple title to certain land of the petitioner, through condemnation proceedings in the District Court below brought for the purpose of erecting a school-building thereon; that thereafter the petitioner had refused to surrender possession of the premises to said District; had refused to pay any rental to said District for the use of said premises while it was preparing but unable to utilize the land for school uses.

Petitioner in the cause in the Municipal Court set up the plea that title to the land was in him; whereupon the cause was certified or transferred to the District Court below for trial in accordance with its rules, the Federal Rules of Civil Procedure, and the laws of said District. After certifica-

tion of the cause to the District Court, petitioner by his answer (R. 9-10) asserted the defense that the District of Columbia could not, by reason of existing federal priority decrees, obtain materials for the construction of a school-building on the land involved, either then or in the determinable future; that said District had never made inquiry from any authority as to the possibility of use of the land for a school-building, from the standpoint of construction, and had, therefore, decided upon renting the property pending such time as a school-building could, if ever, be erected thereon. (R., 5-6).

The District Court, with Justice Pine sitting, in ruling upon the plaintiff's motion for judgment in its favor, adjudged that there was a genuine issue as to a material fact, in that the possibility of a reverter of title to the petitioner, through abandonment, forfeiture, misuser and non-user of such land, was a matter of fact to be determined upon the merits before a jury. (R. 6). Thereupon the District of Columbia amended its complaint (filed in the suit in the Municipal Court) with the permission of petitioner, and set forth the same facts, (R. 7-8), as set forth in the original complaint. (R. 1). Immediately thereafter the plaintiff filed a second motion for judgment on the ground "that there is no genuine issue as to any material fact, and that the plaintiff is entitled to a judgment as a matter of law." (R. 10). This motion does not seek a summary judgment in favor of the plaintiff, under Rule 56 of the Federal Rules of Civil Procedure, and is not supported by any evidence whatever from the plaintiff. Yet the order of Justice Bailey, on his own motion, supplied the word "summary" and "all affidavits filed in support of and in opposition to said motion and the record in district Court Cause No. 2731," (R. 13). This order granting the plaintiff's second motion for judgment in its favor, and, also, adjudged that the plaintiff have and recover possession of the real estate involved

in the action. (R. 13). And from this order and judgment the petitioner (defendant) took an appeal to the United States Court of Appeals for the District of Columbia.

The Court of Appeals below, on its own motion, supplied the deficiencies apparent of record, in that its opinion declared: "A motion for *summary* judgment in favor of the District was granted by the court below from which judgment this appeal was taken." That Court, by its opinion, also attempted to adjudicate divers matters of fact about which there is no evidence in the record, as no evidence was adduced by either party in the case.

The time for filing of this petition for certiorari expires on March 25, 1945. This petition was filed in this Honorable Court on March 15, 1945.

Jurisdiction to Review the Judgment

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (28 U. S. C. A., section 347 (a)). The judgment of the United States Court of Appeals for the District of Columbia was entered December 26, 1944. This petition was filed March 15, 1945.

Reasons Relied On For the Allowance of the Writ

The writ prayed should be allowed by this Court for the following reasons:

1. *Because of the important question of practice.* In this case the District Court below rendered two judgments, the first by Justice Pine, and the second by Justice Bailey. Such proceedings have no precedent in the history of jurisprudence in this country. The latter judgment was called by the Court a "summary" judgment, yet no motion therefor was ever made by the District of Columbia, pursuant to

the Rule 56 of the Federal Rules of Civil Procedure. And the Court of Appeals below, in its opinion merely assumed, without looking at the record, that a motion for "summary" judgment was made in the trial Court, and then affirmed the action of that Court which supplied the omissions, and then proceeded to adjudicate matters of fact about which there is no evidence in the record. This judgment of that appellate Court therefore, is absolutely void, because it transcended the limits of its authority in this cause. In *Wind- sor v. McVeigh*, 93 U. S. 274, 282, this Court declared: "Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its mode of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law."

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued by this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and send to this Court, for review and determination, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket as "*James H. O'Hara, appellant, versus District of Columbia, appellee, No. 8674*," and that the judgment of the Court of Appeals below be reversed by this Court, and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper; and your petitioner will ever pray.

WILLIAM J. O'MAHONY,
Attorney for Petitioner.

T. EMMETT MCKENZIE,
JAMES L. BUCKLEY,
Each of Counsel.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1043

JAMES H. O'HARA,

versus

Petitioner,

DISTRICT OF COLUMBIA

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

I

The Opinions of the Courts Below

The opinion of the United States Court of Appeals for the District of Columbia has not yet been officially reported, but is copied in the record (R. 14). No opinion of the District Court below was made in the case.

II

Jurisdiction

The judgment of the United States Court of Appeals below was rendered on December 26, 1944 (R. —). This petition for writ of certiorari was filed in this Court on March 15, 1945. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code,

as amended by Act of February 13, 1925, ch. 229, 43 Stat. 936, Section 347 (a), Title 28, United States Code.

III

Statement of the Case

A full statement of the case has been given in the foregoing petition, under the head "Summary Statement of Matters Involved," and is adopted here as though fully set forth.

IV

Rules of Court Involved

Rule 56 of the Federal Rules of Civil Procedure provides:

"RULE 56. SUMMARY JUDGMENT

(a) **FOR CLAIMANT.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, moved with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

* * * * *

(c) **MOTION AND PROCEEDINGS THEREON.** The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

V

Specification of Errors

1. The Court of Appeals below erred in deciding that a motion for summary judgment in favor of the District of Columbia was granted by the District Court below.

2. The Court of Appeals below erred in adjudicating matters of fact, in the absence of any evidence of record.

3. The Court of Appeals below erred in affirming the judgment of the trial court in the case.

VI

Summary of Argument

1

The Court of Appeals below should not have departed from the usual and accepted course of judicial proceedings, when it departed from the record and decided that a motion for summary judgment in favor of the District of Columbia was granted by the District Court below.

2

The Court of Appeals below departed from the usual and accepted course of judicial proceedings, when it departed from the record and sought to adjudicate matters of fact, in the absence of any evidence of record in the case.

VII

ARGUMENT

POINT 1

The Court of Appeals Below Should Not Have Departed From the Usual and Accepted Course of Judicial Proceedings, When It Departed From the Record and Decided That a Motion For Summary Judgment In Favor of the District of Columbia Was Granted by the District Court Below.

It is obvious that the Court of Appeals below failed to carefully examine the record then before it for consideration. For this record fails to show in its body that the District of Columbia ever filed in the case a motion for summary judgment in its favor. Summary judgments in the trial court are authorized by Rule 56 of the Federal Rules of Civil Procedure, the pertinent parts of which are set forth in this brief, but such rule was not mentioned or referred to in the motion which was actually filed in the case by the District of Columbia. For it reads as follows (R. 10):

“MOTION FOR SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF

Plaintiff moves the court as follows:

To order entry of judgment in favor of the plaintiff on the ground that there is no genuine issue as to any material fact, and that plaintiff is entitled to a judgment as a matter of law.”

The name or title of the above motion contains the word “summary”, but such name or title does not determine the character of the motion.

“It is not necessary to give any name to a pleading, nor is the name, if given, controlling, since the charac-

ter of a pleading is determined by its allegations of subject matter and legal effect."

49 Corpus Juris, section 9, p. 35; citing *Farmers' State Bank v. Kirkland*, 200 Ala. 146; *Commonwealth v. Wakelin*, 230 Mass. 567, 571; *Lopp v. Lopp*, 181 N. Y. S. 476.

"The name given to the motion itself is unimportant where the forms of motion have been abolished in practice, the character of the motion being determined by the facts and the relief authorized to be granted."

42 Corpus Juris, section 31, p. 478; citing *Phillips v. Gammon*, 188 Ind. 497; *Ginn v. Knight*, 196 Okl. 4.

POINT 2

The Court of Appeals Below Should Not Have Departed From the Usual and Accepted Course of Judicial Proceedings, When It Departed from the Record and Sought to Adjudicate Matters of Fact, in the Absence of Any Evidence of Record in the Case.

The record discloses the so-called summary judgment entered by the trial court and, if such be valid and in response to a valid motion therefor, it determined that there is no genuine issue as to any material fact in the case and that the District of Columbia is entitled to a judgment as a matter of law. Such proceedings, therefore, deprive the parties-litigant of the right to adduce evidence in support of their rights contended for, and before a jury which was demanded by the defendants. (R. 10.) yet in the absence in the record of any evidence, the Court of Appeals below by its opinion attempted to adjudicate divers matters of fact and, by so doing, decided matters beyond its jurisdiction, and its judgment is not only erroneous but abso-

lutely void. In *Windsor v. McVeigh*, 93 U. S. 274, 282, this Court aptly said:

“Though the court may possess jurisdiction of the cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure. It must act judicially in all things, and cannot then transcend the power conferred by the law.”

And in *Reynolds v. Stockton*, 140 U. S. 254, 268, this Court said:

“A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as to conclude a point upon which the parties have not been heard.”

Not only this, but the Record (App. R. 12) shows that the trial Court, acting through Justice Pine, had entered a previous order denying the motion of the District of Columbia for a judgment in its favor. Such motion was identical in language to that which was later made and submitted to the trial Court, with Justice Bailey sitting. So, if Justice Pine's judgment be valid then there are genuine issues of fact which warrant a trial. This judgment has never been modified, vacated, or set aside, and stands in full force and effect in the case. This judgment precluded any subsequent judgment upon another like motion. It is *res judicata*.

“If the motion has been already decided, it seems that the order must first be opened or set aside, and it has been held that a motion once overruled cannot be called up for rehearing by the defeated party until upon proper notice to his adversary the order has been set aside.

Townsend v. Wisner, 62 Iowa, 672.

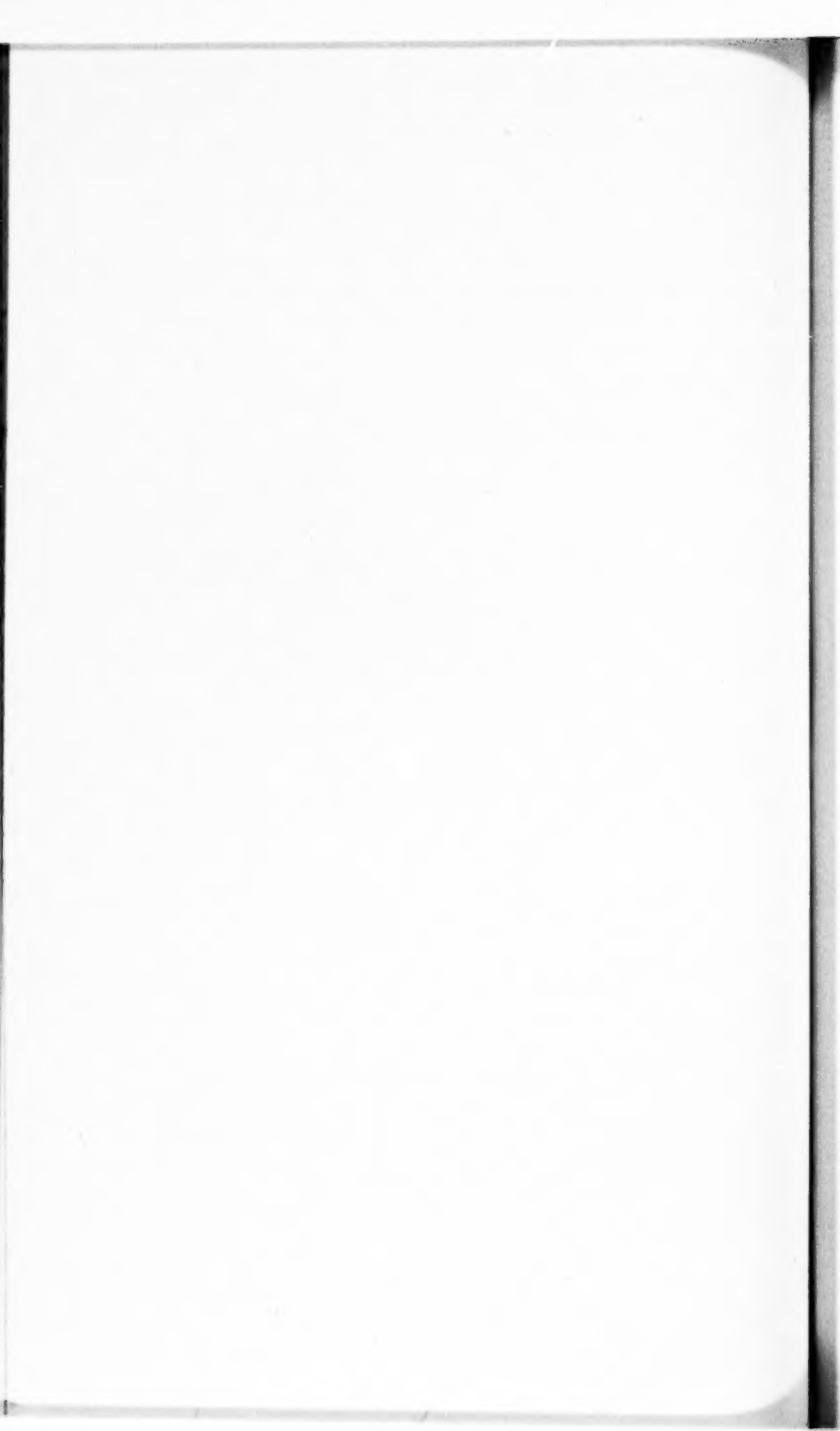
Conclusion

It is respectfully submitted that this case is one calling for the exercise by this Court of its power of supervision and that a writ of certiorari should be granted as prayed in the petition, to the end that relief may be granted your petitioner herein, and the case reversed.

Respectfully submitted,

WILLIAM J. O'MAHONY,
Attorney for Petitioner.

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No. 1043

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IN THE SUPREME COURT OF THE UNITED STATES

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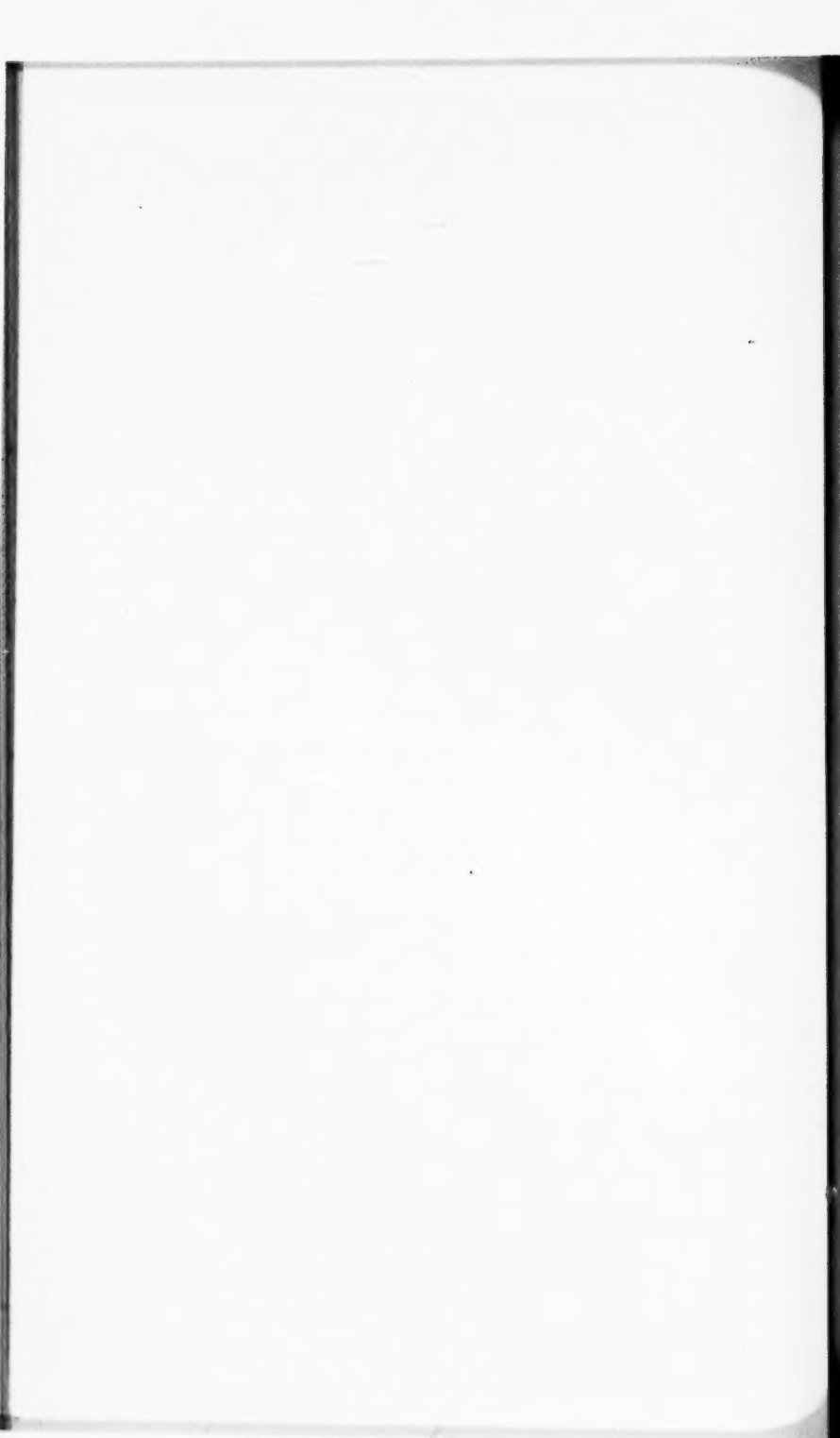
JAMES H. O'HARA, *Petitioner,*

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DISTRICT OF COLUMBIA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR
CERTIORARI

RICHMOND B. KEECH,
Corporation Counsel, D. C.,
VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.,
Attorneys for Respondent,
District Building.



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944
No. 1043

JAMES H. O'HARA, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR
CERTIORARI

ARGUMENT

Point I

The Court of Appeals below did not depart from the record in deciding that a motion for summary judgment in favor of the District of Columbia was granted by the District Court below.

Petitioner contends in this court for the first time that the District of Columbia made no motion in the trial court for a

summary judgment and that, therefore, the trial court should not have entered such a judgment in favor of the District. The District did file a motion entitled "Motion for Summary Judgment in Favor of Plaintiff" in which it moved the court "to order entry of judgment in favor of the plaintiff on the ground that there is no genuine issue as to any material fact, and that plaintiff is entitled to a judgment as a matter of law" (R. p. 10). While it is true that this motion, except in its title, did not refer to a summary judgment, it did move for judgment on the grounds set forth in paragraph (c) of Rule 56 of the Rules of Civil Procedure as the grounds for the granting of a summary judgment. It is obvious petitioner was in no way mislead since he, in response to such motion, filed a paper entitled "Answer to Motion for Summary Judgment (Res Adjudicata)". (R. p. 10.) In his typewritten brief in the Court of Appeals (page 4), petitioner states that "appellee filed a second motion for summary judgment"; that "appellant filed in writing an answer to the motion for summary judgment" and that the court "filed his order granting the motion". It is obvious that until the filing of this petition, appellant regarded the motion made by the District of Columbia as a motion for summary judgment upon which the order granting the summary judgment was properly based.

Point II

The overruling of the District of Columbia's first motion for summary judgment did not preclude the granting of the second motion.

The action of the District Court in overruling the first motion for summary judgment was not res judicata of the second motion. This action was originally brought in The Municipal Court for the District of Columbia under the forcible entry and detainer statute. Sec. 20, D. C. Code, 1901, approved March 3, 1901, 31 Stat. 1193, as amended April 19, 1920, 41

Stat. 555, Sec. 11-735 D. C. Code, 1940. Under this statute, it was the duty of the District to allege and prove that appellant was forcibly detaining the property. This allegation of the complaint was denied in the plea of title (R. p. 2). No affidavits upon this subject were filed and hence there was an issue as to a material fact. While counsel for petitioner in his petition for writ of certiorari filed in this court (page 3) states that, in denying the first motion for summary judgment, the trial court "adjudged that there was a genuine issue as to a material fact, in that the possibility of a reverter of title to the petitioner, through abandonment, forfeiture, misuser and nonuser of such land, was a matter of fact to be determined upon the merits before a jury", there is nothing in the record to support this statement. On the contrary, it is obvious the court denied the motion because of the issue of fact as to whether the detainer was forcible. Petitioner, in his answer to the second motion for summary judgment (R. p. 11), states that contemporaneously with the denial of the first motion "Mr. Justice Pine suggested that the present amended complaint be filed without dismissing the original action, if agreeable to the parties" and that "defendant consented to this". Certainly the trial court would not have suggested the complaint be amended to lie in ejectment if the same objection to a summary judgment would exist. It is obvious the suggestion was made to avoid the issue of forcible detainer and present solely the question of title. The difference between an action for forcible entry and detainer and an action in ejectment is stated by the United States Court of Appeals for the District of Columbia in *Brown v. Slater*, 23 App. D. C. 51, where it is said:

"* * * The proceedings for forcible entry and detainer are not the equivalent of the action of ejectment. Whatever the latter may have been in its origin, its purpose in our country and in our American jurisprudence has always been primarily to determine the question of title, and only secondarily, and

as a corollary to the other, the question of the right of possession. The proceedings for forcible entry and detainer and for unlawful detainer were devised by the legislative authority as a remedy to supplement the insufficiency of the action of ejectment in cases in which there is no lawful right or claim of title, and possession is perversely withheld from the lawful owner. The title is not tried and is not at issue in them, but solely the right to the possession. The proceeding for forcible entry and detainer and for unlawful detainer was devised mainly to meet the case of vexatious and dishonest holding over by tenants of property leased or rented to them. * * *

The proceeding originally instituted in The Municipal Court, and certified to the District Court upon the filing of the plea of title pursuant to the provisions of Sec. 23, D. C. Code, 1901, 31 Stat. 1193, as amended February 17, 1909, 35 Stat. 623, Sec. 11-738, D. C. Code, 1940, was an entirely different action from that embodied in the complaint in ejectment filed under different sections of the Code¹ and which could only have been filed in the District Court. Entirely different questions were presented.

A similar situation arose in the District of Columbia in the case of *Fraser v. Doing*, 76 U. S. App. D. C. 111, 130 F. (2) 617. A motion for summary judgment was granted in the District Court by Mr. Justice Morris after an earlier motion for summary judgment had been overruled. The appellate court said:

"Appellant's third objection is that Justice Bailey overruled appellee's original motion for a summary judgment; consequently, that his decision became res judicata of the renewal motion and established the law of that phase of the case. Consideration of this

¹ Sec. 984, D. C. Code, 1901, 31 Stat. 1347, as amended June 30, 1902, 32 Stat. 537, Sec. 16-501, D. C. Code, 1940; Sec. 985, D. C. Code, 1901, 31 Stat. 1347, Sec. 16-503, D. C. Code, 1940; Sec. 988, D. C. Code, 1901, 31 Stat. 1347, Sec. 16-505, D. C. Code, 1940.

objection requires the following additional statement of case chronology: Following the filing of appellant's complaint in Civil Action No. 607, appellee, on June 23, 1939, moved for a summary judgment for the reason that there was 'no genuine issue as to any material fact * * *.' and that she was entitled to a judgment as a matter of law. On February 6, 1940, Justice Bailey heard the motion and ordered that it be overruled 'without prejudice to the defendant's further rights in the case.' On the same day appellee filed a renewal motion for summary judgment upon entirely different grounds; challenging in this motion, for the first time, the use of a bill of review or complaint in the nature of a bill of review.

"The foregoing statement is sufficient to reveal that this third objection is, also, without merit. The original motion, for the reason heretofore explained, was wrongly conceived, upon the theory that the language of Rule 56 (c), concerning a 'genuine issue as to any material fact * * *.' was applicable to appellant's complaint. This motion was overruled without prejudice. It seems likely that Justice Bailey, at that time, explained to counsel the applicable law concerning bills of review which challenge alleged errors of law apparent upon the face of the record, and that he also explained the inapplicability of Rule 56(c). This seems apparent because the renewal motion, based upon proper grounds, was filed immediately afterwards. It is obvious, in any event, that Justice Bailey's ruling upon the question presented in the original motion did not pass upon, and was not intended to pass upon, the question presented in the renewal motion. Consequently, it did not become the law of the case upon that point, and the principle of *res judicata* has no application."

Certainly, had the District elected to dismiss its forcible entry and detainer proceeding and file a new action in ejectment in the District Court, there can be no doubt but that the question of *res judicata* could not have been raised. The filing of the amended complaint in ejectment, with the con-

sent of the petitioner, was equivalent to the bringing of a new action.

CONCLUSION

For the reasons hereinbefore stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

RICHMOND B. KEECH,
Corporation Counsel, D. C.,

VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.,
Attorneys for Respondent,
District Building.

